

**TOUCH AMERICA OPPOSITION  
QWEST 271 APPLICATION  
CO, ID, IA, MT, NE, ND  
UT, WA AND WY**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
<b>Qwest Communications</b>	)	
<b>International, Inc.</b>	)	
	)	
Consolidated Application for Authority	)	WC Docket No. 02-314
To Provide In-Region, InterLATA Services in	)	
Colorado, Idaho, Iowa, Montana, Nebraska,	)	
North Dakota, Utah, Washington and Wyoming	)	

**OPPOSITION OF TOUCH AMERICA, INC.**

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October 15, 2002

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**OPPOSITION OF TOUCH AMERICA, INC.**

Pursuant to the Commission's September 30, 2002 Public Notice in the above-referenced proceeding, DA 02-2438, Touch America, Inc. ("Touch America") hereby submits its Opposition to the Consolidated Application of Qwest Communications International, Inc. ("Qwest") for Authority to Provide In-Region, InterLATA services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming ("Application").

**I. INTRODUCTION AND SUMMARY**

Qwest's second bite at the apple is as unconvincing as its first. Several months ago, Qwest filed a Consolidated Application to provide in-region, interLATA services in the states of Colorado, Idaho, Iowa, Nebraska and North Dakota<sup>1</sup> and, a month later, filed a similar application for the states of Montana, Utah, Washington and Wyoming.<sup>2</sup> As set forth in the

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<sup>1</sup> See Qwest Communications International Inc. Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota, WC Docket No. 02-148 (filed June 13, 2002)("Qwest I Application").

<sup>2</sup> See Qwest Communications International Inc. Consolidated Application for Authority to Provide In-Region, InterLATA Services in Montana, Utah, Washington and Wyoming, WC Docket No. 02-189 (filed July 12, 2002).

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filings submitted by Touch America and other parties to those proceedings, the original applications were deficient in many regards. For instance, Qwest's original applications demonstrated that it routinely failed to meet the requisite performance measurements or provide services or facilities at parity, and failed to provide non-discriminatory access to its databases, thereby impeding the ability of competitors to compete on a level playing field. Touch America also showed that Qwest's history of electronic order flow-through is abysmal and billing problems are rife. Touch America demonstrated that these problems were the same as those that it had experienced at the hands of Qwest for the two years since the merger and supposed divestiture of Qwest's long distance assets to Touch America.

In addition, the original applications were squarely contrary to the public interest in that Qwest had been prematurely offering in-region, interLATA service through "lit capacity IRUs" (or infeasible rights of use) and had completely tainted the record in the proceeding by entering into secret agreements which silenced its critics and offered favorable interconnection and access terms to certain of its competitors. Qwest also misrepresented its activities to regulators and gamed the post-merger compliance audits. Moreover, Qwest is the subject of investigation by the Securities and Exchange Commission ("SEC"), the Department of Justice ("DoJ") and the U.S. House of Representatives regarding its suspect financial activities, such as the manner by which it accounted for IRUs. Indeed, as a result of its IRU accounting, Qwest is in the process of restating nearly \$1.5 billion in revenues.<sup>3</sup>

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<sup>3</sup> Accordingly, to date, Qwest's books are not compliant with Generally Accepted Accounting Principles ("GAAP") and, to this day, the senior management of Qwest has not certified the correctness of Qwest's financials as required under the Sarbanes-Oxley Act of 2002.

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Based on this predicate, Touch America demonstrated that monitoring of Qwest's activities and future enforcement would prove insufficient. Qwest had to be stopped now, not later. Touch America also demonstrated that Qwest should at least be required to await the outcome of its accounting analyses, divest itself of the in-region, interLATA assets that it was supposed to have divested to Touch America several years ago and submit to ongoing, genuinely independent audits.

Qwest was rightfully stopped – temporarily<sup>4</sup> – but is now back, albeit with a Consolidated Application that incorporates the original records (and updates certain information and data), but substitutes a new long distance affiliate. Pursuant to the Public Notice, Touch America also hereby adopts and incorporates by reference all of its submissions to the records of WC Docket Nos. 02-148 and 02-189.<sup>5</sup> In this Opposition, Touch America responds to the additional or new information in Qwest's Application, as well as other events that have transpired since the time Qwest withdrew its original applications.

As demonstrated herein, the new Application does nothing to cure the defects of the prior applications and, as such, it should be denied. Qwest's refiled Application is just more of the same: creative maneuvering around the law in an effort to sneak its way into the long distance market. Qwest has created a new long distance affiliate, Qwest Long Distance Corp. ("QLDC"), which is nothing but a sham designed to try to remedy Qwest's failure to comply with section 272. Even a cursory reading of Qwest's Application makes clear that QLDC, with no assets and

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<sup>4</sup> Qwest withdrew its original 271 applications on September 10, 2002, one day before the Commission was to rule on the Qwest I Application, when it realized that the Commission was not going to act favorably on the applications.

<sup>5</sup> Exhibit A identifies the filings that Touch America specifically incorporates into this proceeding.

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operating as a reseller, will serve as the long distance affiliate only until such time as its former long distance affiliate, Qwest Communications Corp. (“QCC”), merges into and becomes the real long distance affiliate. The Commission should not be fooled by Qwest’s chicanery. Qwest cannot insert a long distance affiliate placeholder for purposes of obtaining 271 approval. Further, the new affiliate does nothing to cure the fact that the Bell Operating Company (Qwest Corp. or “QC”) is not GAAP compliant, in violation of section 272. QC’s failure to be GAAP compliant makes it impossible to detect whether QC is or will be subsidizing or discriminating in favor of QLDC, objectives which are at the heart of section 272. Qwest’s Application must therefore be denied. At minimum, Qwest must await the outcome of its accounting analysis and complete the associated restatement of earnings so that all its books are clean – QC and its long distance affiliate – and the goals underlying the long distance affiliate requirement are upheld.

Moreover, events that have taken place since the time that Qwest withdrew its original applications for 271 authority – including further evidence and admissions by Qwest that it has been violating section 271 for several years and crafting oral side agreements to purposely hide those activities from regulators, Qwest’s announcements increasing the original estimate of its earnings restatements, rulings related to the “secret” agreements which confirms that Qwest has been violating section 252 of the Act, and additional consumer-related disputes – compels denial of the Application. Under Commission precedent, Qwest’s violation of federal law and the litany of other bad acts mandates rejection of the Application. More and more questions continue to be raised regarding Qwest, and yet Qwest persists. Qwest should not be permitted to begin offering long distance service while questions related to its entire operations and its compliance with the law are investigated by regulators, law enforcement officials and legislators.

Finally, the additional performance data and supplemental information that Qwest provides in its refiled Application do nothing to support approval of the Application. Qwest's electronic order flow-through and billing problems continue unabated, to the detriment of competitors. In short, Qwest's Application must be denied.

## II. ARGUMENT

### A. **QLDC is a sham and the Commission should not make a judgment as to 272 compliance at least until such time as Qwest has completed its accounting analysis, cleaned up the books of QC and the "real" 271 affiliate is before the Commission.**

As part of its determination as to whether Qwest should be permitted into the in-region, interLATA market, the Commission must find that the 271 authorization "will be carried out in accordance with the requirements of section 272."<sup>6</sup> Although the Commission has determined to make a "predictive judgment" as to whether a Bell Operation Company ("BOC") will comply with section 272, in this instance, the Commission cannot make such a determination.

In its Application, Qwest puts forth a newly formed indirect wholly-owned subsidiary, QLDC, as its long distance affiliate. QLDC currently owns no telecommunications facilities and intends to commence operation as a switchless reseller.<sup>7</sup> Qwest claims that because it is a new company, QLDC's books, records and accounts are not subject to past accounting irregularities.<sup>8</sup> Qwest also assures the Commission that, under the direction of its new Chief Financial Officer, its books, records and accounts will be maintained in accordance with GAAP.<sup>9</sup> Qwest's replacement of QCC with QLDC is a ruse and does not cure Qwest's failure to comply with the

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<sup>6</sup> 47 U.S.C. § 271(d)(3)(B).

<sup>7</sup> See Application at 10.

<sup>8</sup> *Id.* at 11-12.

<sup>9</sup> *Id.*

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requirements of section 272. QLDC is nothing more than a placeholder long distance affiliate for Qwest until its restatement is complete and its books and records are put in order. The Commission must make its section 272 compliance determination on a real long distance affiliate, not a temporary, propped-up corporate shell.

Further, Qwest has stated that it cannot certify QC's financial statements until its pending accounting review is completed,<sup>10</sup> but that it had identified "certain potential adjustments to the financial statements of QC that may be necessary to comply with GAAP."<sup>11</sup> That is, Qwest has admitted that it is "unable to certify that QC's financial statements are accounted for consistently with GAAP."<sup>12</sup> Because QC is not GAAP compliant, the purposes of the separate long distance affiliate requirement are compromised and the Application must be denied. The Commission must wait until all of its books – including those of QC – are certified as GAAP compliant before it makes a judgment as to Qwest's compliance with its section 272 obligations.

1. The Commission should reject QLDC as a sham designed to mask Qwest's true intentions with respect to QCC.

A quick reading of Qwest's Application makes evident that Qwest is trying – again – to deceive regulators as to its true intentions. Qwest has made clear that it does not know when its accounting analysis will be complete or its resulting restatement of earnings implemented.<sup>13</sup> Rather than wait for the conclusion of its accounting analysis and restatement of its books at all

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<sup>10</sup> See August 26, 2002 letter from Oren Shaffer, Vice Chairman and Chief Financial Officer Qwest Communications International Inc., to Marlene Dortch, Secretary, Federal Communications Commission at 1-2 (filed in WC Docket Nos. 02-148 and 02-189)(“August 26 *Ex Parte* Letter”).

<sup>11</sup> See August 20, 2002 letter from Oren G. Shaffer, Vice Chairman and Chief Financial Officer, Qwest Communications International Inc., to Marlene Dortch, Secretary, Federal Communications Commission at 1 (filed in WC Docket Nos. 02-148 and 02-189).

<sup>12</sup> *Id.* at 2.

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levels, Qwest hastily threw together a new, shell corporation to serve as its long distance affiliate, deemed it GAAP compliant and refiled its Application. QLDC is nothing more than a placeholder, created to offer resale long distance service until such time as the books of QCC are straightened out and the real long distance affiliate – QCC – can once again step forward. Qwest all but admits this in its Application when it states:

QCC is continuing to operate as described in the Qwest I and Qwest II declarations . . . although it will not provide in-region interLATA services *at this time*. The existing records in the Qwest I and Qwest II proceedings show that QCC also will be a fully compliant Section 272 affiliate upon completion of the restatement arising from the past period transactions of QCC with third parties. *Qwest does not know when that restatement process will be complete, resolving the Section 272 issue with respect to QCC. At such time QCC and QLDC may be merged*, although no final decisions have been made as of now.<sup>14</sup>

Clearly, QLDC is a ruse. The Commission must pass judgment on the entity that will really be offering the long distance service, not some simulation or predecessor thereof. Indeed, the state commissions, which have undertaken lengthy analyses related to section 272 compliance, have not had an opportunity to evaluate this new entity's operations and transactions.

2. Because QC is not GAAP compliant, the goals of the separate affiliate requirements are compromised.

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<sup>13</sup> See, e.g., Application at 9.

<sup>14</sup> Application at 9-10, n. 11 (emphasis added). In fact, where Qwest purports to demonstrate that its long distance affiliate complies with GAAP, Qwest, in some instances, still refers to QCC, not QLDC. See Application at 11 (“QCC has established and maintains a chart of accounts that is separate from that of QC” and “QCC maintains expenditure controls to ensure that funds are expensed and accounted for properly”).

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Pursuant to Commission regulations, a Bell Operating Company (here, QC) is required to maintain its financial records in accordance with GAAP.<sup>15</sup> Pursuant to section 272 and its implementing regulations, a BOC's long distance affiliate (formerly, QCC, but now QLDC) is required to maintain its books, records and accounts in accordance with GAAP.<sup>16</sup> In addition, all transactions between the BOC and its long distance affiliate must be accounted for in accordance with GAAP.<sup>17</sup> There are, therefore, three components that must independently meet the GAAP requirements: QC, QLDC and transactions between the two entities.

At first, in an effort to minimize the effect of its non-compliance with accounting requirements, Qwest adopted an overly restrictive view of section 272, asserting that only one component – the transactions between QC and QCC – is relevant. Qwest further claimed that the transactions between QC and QCC were GAAP compliant and approval of the Application was therefore warranted.<sup>18</sup> Ultimately, Qwest realized that the Commission saw the absurdity of Qwest's position. Qwest now comes before the Commission with a shiny new 271 affiliate. Qwest states that, by definition, QLDC is GAAP compliant, presumably by virtue of the fact that it is a shell corporation, and that all transactions between QC and QLDC are GAAP compliant.<sup>19</sup>

The fact remains that QC is not GAAP compliant and, therefore, any future services or transactions between QC and QLDC are suspect. The accounting safeguards set forth in section 272 are intended to “discourage and facilitate the detection of improper cost allocation and cross-

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<sup>15</sup> 47 C.F.R. § 32.12(a).

<sup>16</sup> 47 U.S.C. § 272(b)(2); *In the Matter of Implementation of the Telecommunications Act of 1996, Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, 11 FCC Rcd. 17539, 17618, ¶ 170 (1996) (“*Accounting Safeguards Order*”).

<sup>17</sup> 47 U.S.C. § 272(c)(2).

<sup>18</sup> See Application at 3-4; Qwest's August 26 *Ex Parte* Letter at 2.

<sup>19</sup> See Application at 11-12.

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subsidization between the BOC and its 272 affiliate,” as well as to “ensure that BOCs do not discriminate in favor of their section 272 affiliates.”<sup>20</sup> Compliance with section 272 is “of crucial importance” because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field.<sup>21</sup> The Commission must not look lightly on Qwest’s new affiliate. Fuzzy accounting on one side is enough to permit mischief. Long distance affiliates are required to comply with GAAP because BOCs are required to comply with GAAP, thereby allowing for “a uniform audit trail.”<sup>22</sup> If one entity is not GAAP compliant, the audit trail is compromised as the BOC is able to shift costs from its competitive affiliate and to discriminate in favor of such affiliate.

Qwest has a “comprehensive analysis underway”<sup>23</sup> with respect to the nature and significance of its restatement of earnings and, as result, the Commission must await the outcome of such undertaking before making a judgment as to the likelihood of Qwest’s compliance with its statutory obligations. In fact, the amount of Qwest’s projected restatement continues to rise. In July, 2002 Qwest estimated that it would be restating approximately \$1.16 billion of revenues as a result of its IRU “sales.”<sup>24</sup> By September 22, Qwest had increased the total amount subject to the restatement to \$1.48 billion, restating that \$950 million is attributable to “exchanges of

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<sup>20</sup> *Joint Application of SBC Communications, Inc. for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd. 6237, at ¶ 147 (2001).

<sup>21</sup> *Id.* (citing *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, 12 FCC Rcd. 20543, 20725 (1997)(“*Michigan 271 Order*”).

<sup>22</sup> *Accounting Safeguards Order* at ¶170.

<sup>23</sup> See August 26 *Ex Parte* Letter at 4.

<sup>24</sup> See “Qwest Communications Provides Current Status of Ongoing Analysis of Its Accounting Policies and Practices,” July 28, 2002, attached hereto as Exhibit B (“July 28<sup>th</sup> Restatement Announcement”).

optical capacity assets” and announcing the likely future restatement of an additional \$531 million related to “sales of optical capacity assets.”<sup>25</sup> Qwest should first get its books straight once and for all before receiving authority to provide in-region, interLATA services.

3. Qwest violates Section 272(b)(3).

Section 272(b)(3) requires a BOC to have separate officers, directors and employees from its long distance affiliate.<sup>26</sup> Qwest claims that it meets this statutory obligation through a comparison of QC’s and QLDC’s officer and director lists and payroll, as well as the implementation of “extensive controls to govern the sharing of services in order to ensure that the companies operate independently and that confidential information is not shared between them.”<sup>27</sup> Qwest claims that it also has a policy of prohibiting loaning of employees between QC and QLDC.<sup>28</sup> As a newly-formed shell corporation, it is difficult at this time to ascertain the truth of these statements with respect to QLDC. However, in Touch America’s experience, Qwest has routinely transferred employees between QC and QCC. Touch America has encountered the same Qwest personnel in QC and QCC. For instance, Touch America’s account representative on the local side, QC, was transferred to QCC and became Touch America’s account representative for QCC. While this account representative may not have been on the payroll of both companies at the same time, he clearly was in the position to use his knowledge and experience with the local operations for the long distance operations. Moreover, Qwest should be restricted from housing employees within a third entity (*e.g.*, Qwest Services Corp.)

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<sup>25</sup> See “Qwest Communications Updates Status of Analysis of Optical Capacity Asset Transaction Accounting Policies and Procedures,” September 22, 2002, attached hereto as Exhibit C.

<sup>26</sup> 47 U.S.C. § 272(b)(3).

<sup>27</sup> See Application at 12.

and loaning the employees to both QC and QCC. Qwest's policies on inter-company employee transfers violate the spirit, if not the letter, of the prohibition against sharing of employees and the requirement that the BOC and its long distance affiliate operate independently.

**B. Qwest's violations of Sections 252 and 271 of the Act mandate denial of the Application.**

The Commission has made clear that a BOC may not satisfy the 271 checklist's public interest test where the BOC is violating federal law.<sup>29</sup> As early as the Michigan 271 proceeding, the Commission found that "evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations" is relevant to the public interest determination under section 271.<sup>30</sup> The Commission elaborated, stating that:

[b]ecause the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of . . . the BOCs with new entrants and *good faith compliance by such LECS with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations* would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.<sup>31</sup>

In addition, in connection with Verizon's 271 application for the state of New Jersey, where Verizon had engaged in premature marketing of its long distance service, the Commission cautioned that "BOCs should not market long distance service in an in-region state prior to receiving section 271 approval from the Commission for that

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<sup>28</sup> *Id.*  
<sup>29</sup> *Michigan 271 Order* at ¶ 397.  
<sup>30</sup> *Id.*  
<sup>31</sup> *Id.* (emphasis added).

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particular state and we remind Verizon and all BOCs to exercise caution in this regard.”<sup>32</sup>

Similarly, following Bell Atlantic’s 271 proceeding for the state of New York, the Commission found that if Bell Atlantic’s violation of section 271 by mishandling or losing orders for unbundled network elements electronically submitted by its local service competitors continued, “the Commission may issue an order requiring Bell Atlantic to show cause as to why the Commission should not suspend or revoke Bell Atlantic’s authority to provide long distance service”.<sup>33</sup>

Here, Qwest has been thumbing its nose at its statutory obligations and wholly ignoring statutory proscriptions. Specifically, as set forth below, Qwest has violated sections 252 and 271 of the Act, respectively, through: (1) the premature offering of 271 services under the guise of “lit capacity IRUs” and other artifices; and (2) the failure to file interconnection agreements with state commissions for approval and make such agreements available to other carriers. Qwest has also engaged in anticompetitive and fraudulent conduct by entering into secret agreements and covering up its activities, and has made misrepresentations (or material omissions) to federal and state regulators related to both its 252 obligations and 271 activities. As a result of Qwest’s unlawfulness and misconduct, Qwest’s Application must be denied.<sup>34</sup>

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<sup>32</sup> See *In the Matter of Application by Verizon New Jersey, Inc. for Authorization to Provide In-Region, interLATA Services in New Jersey*, WC Docket No. 02-67, Memorandum Opinion and Order, FCC 02-189, ¶ 190 (rel. June 24, 2002)(“*New Jersey 271 Order*”).

<sup>33</sup> See *In the Matter of Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, File No. EB-00-IH-0085, Order, FCC 00-92 at ¶¶ 1& 6 (rel. March 9, 2000)(“*Bell Atlantic Consent Decree*”).

<sup>34</sup> See *In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, 12 FCC Rcd. 7847, ¶ 41 (1997)(in creating its rules and policies on foreign participation in U.S. telecommunications markets, the Commission found that “conduct warranting denial of an authorization may include adjudicated

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Relying principally on the *Georgia/Louisiana 271 Order*, Qwest repeatedly claims that a section 271 proceeding is not the place to consider “disputes that are pending (or more properly belong) in separate complaint or enforcement dockets” or “unresolved interpretive disputes about the precise content of an incumbent LEC’s obligations to its competitors.”<sup>35</sup> However, the *Georgia/Louisiana 271 Order* involved two CLECs and their right to interconnect at “any technically feasible point” within BellSouth’s network.<sup>36</sup> This case does not involve a carrier-specific dispute related to interconnection points, but rather, the fact that Qwest has violated two of the fundamental underpinnings of the 96 Act: (1) the BOC prohibition against offering in-region, interLATA service without Commission approval; and (2) the obligation of the BOC to file interconnection agreements with state commissions for their approval and to make them available to all competitors on a nondiscriminatory basis. Accordingly, the Commission’s directives in the *Michigan 271 Order*, the *New Jersey 271 Order* and the *Bell Atlantic Consent Decree* related to violations of the law are far more apt than the language Qwest relies upon in the *Georgia/Louisiana 271 Order* related to interconnection points.

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violations of . . . laws protecting competition . . . [or] a demonstration that a foreign carrier has engaged in a pattern of anticompetitive or fraudulent conduct . . . or fraudulent representations to U.S. governmental units or criminal misconduct involving false statements or dishonesty); *In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, 12 FCC Rcd. 23891, ¶53 (1997)(expressing its concern with “the impact of granting authorization to an applicant that is unlikely to abide by the Commission’s rules and policies . . . [because] the past behavior of an applicant may indicate that it would fail to comply with the Commission’s competitive safeguards and other rules and whose behavior, as a result, could damage competition in the U.S. market and otherwise negatively impact the public interest”). *See also MCI Telecommunications Corp.*, 3 FCC Rcd. 509, 515, n. 14 (1988)(stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context).

<sup>35</sup> *See, e.g.,* Application at 8 (citing *Joint Application of SBC Communications, Inc. for Provision of In-Region InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, Memorandum Opinion and Order, ¶ 305 (rel. May 15, 2002) (“*Georgia/Louisiana 271 Order*”).

1. Qwest's knowing violations of Section 271 through "lit capacity IRUs" mandates denial of the Application.

Touch America described in detail in its submissions in WC Docket Nos. 02-148 and 02-189 the manner by which Qwest has been violating section 271 for the past two years. In addition to offering in-region, interLATA services billed and branded by Qwest or held out as "corporate communications," Touch America demonstrated that Qwest has been providing prohibited in-region, interLATA services under the guise of its contrived concept of "lit capacity IRUs." In fact, in its July 28th Restatement Announcement, Qwest effectively admitted that it has been violating section 271 of the Act for over two years.<sup>37</sup> That is, although Qwest had all along claimed that its "lit capacity IRU" agreements are asset sales (*i.e.*, a sale of facilities), not leases of telecommunications services, in its July 28 Restatement Announcement, Qwest disclosed that it has "in some cases applied its accounting policies incorrectly with respect to certain optical capacity asset sale transactions in 1999, 2000 and 2001" and, more particularly, that, in some instances, the "optical capacity asset sales" should have been "instead treated as operating leases or services contracts."<sup>38</sup> Qwest is therefore undertaking the process of restating all the up-front revenues it booked from the supposed "sales of assets," which were, in fact, "services." In doing so, Qwest admits that it has been violating section 271 of the Act through the sale of "lit capacity IRUs," which are, in fact, nothing more than the provision of in-region, interLATA services.

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<sup>36</sup> *Georgia/Louisiana 271 Order* at ¶207.

<sup>37</sup> *See* July 28 Restatement Announcement, Exhibit B at 2-3.

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Events that have transpired since Qwest withdrew its original applications make Qwest's 271 violations more evident. Under oath, executives of Qwest have confirmed Qwest's plan to sell capacity services in violation of section 271. In an email uncovered in connection with the investigation and recent hearings before the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee, Qwest's second-highest-ranking executive encouraged employees to proceed with an unlawful, in-region interLATA lit capacity IRU transaction in 2000 and offered to "take the fall" if the company was caught.<sup>39</sup> In the email, Qwest employees William Felix and David Boast explained that the capacity service (IRU) that another telecommunications carrier wanted to buy would not be available for at least another month, as such sale conflicted with Qwest's concurrent deal with its agreement to divest its in-region long distance business to Touch America. The email continues as follows:

Boast: We agreed at the time of the Touch America card allocation that we would not be able to do both this IRU and Touch America. This is not a challenge – it is impossible and we shouldn't spend any time at all on this or we could jeopardize our other activities (271 & Q2). Let's get sales to find other IRU opportunities.

Mohebbi: What if we mis-route the IRU and then route it as it is suppose (sic) to?

Boast: IF we could do this (which I'm not sure we can), then all we have to do is get audited, get caught, and get screwed!"

Mohebbi: I know it is risky. I will take the fall for it!<sup>40</sup>

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<sup>38</sup>

*Id.*

<sup>39</sup>

See "Qwest exec advocated dicey sale", A. Mulkern, Denver Post (October 1, 2002), reproduced and attached hereto as Exhibit D.

<sup>40</sup>

See Excerpt of transcript from hearing before the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, "Capacity Swaps by Global Crossing and Qwest: Sham Transactions Designed to Boost Revenues?" October 1, 2002, attached hereto as Exhibit E. The official transcript from the hearing is not yet available.

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Of course, when questioned about the obvious implication of the email, Mr. Mohebbi concocted a story worthy of Qwest. Mr. Mohebbi stated that the reference to misrouting the IRU was an engineering matter – the inability to connect from point A to point B at the shortest distance – and his response that he would “take the fall” related to accounting matters. That is, Mr. Mohebbi testified that he only meant for Mr. Boast to take care of the engineering aspects of the transaction and he would be responsible for any accounting issues but, not, that he was telling Mr. Boast to go ahead and break the law and he would take responsibility for it. Clearly, this revisionist explanation does not, in the words of Representative Tauzin’s spokesman, “pass the smell test.”<sup>41</sup> Qwest knew what it was doing – selling “IRUs” in violation of the divestiture order and section 271 and recognizing the revenue up front – was unethical and illegal yet, feeling pressure to boost sales and revenues, went forward.

Other extensive testimony from the hearings before the Subcommittee make evident that Qwest attempted to structure the IRU deals to enable Qwest to recognize the revenue up front as a sale of assets, but then entered into oral side agreements, the terms of which transformed the agreements into service agreements.<sup>42</sup> Because the side agreements were oral, however, Qwest was able to hide them from regulators and other interested parties.

Qwest should not be rewarded for its actions by being permitted to provide the services that it has been wrongfully selling all along. Instead, Qwest’s Application should be denied.<sup>43</sup>

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<sup>41</sup> See Denver Post article, attached as Exhibit D, at 1.

<sup>42</sup> See Exhibit E.

<sup>43</sup> See *In the Matter of the Applications of TeleSTAR, Inc. For Authority to Construct New Common Carrier Point-to-Point Microwave Radio Stations*, File Nos. 1743 CF-P-85 through 1757 CF-P-85, 2 FCC Rcd. 5, ¶¶30-35 (1987)(refusing a license to a company that concealed the fact that it started building towers for microwave transmission before the agency had approved their construction); *In Re the Applications of Liberty Cable Co., Inc. for Private Operational*

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At minimum, Qwest must be required to divest itself of its long distance assets and customers prior to being permitted to provide long distance service. Qwest must not be allowed the unlawful jumpstart in the long distance market that it has provided itself, but must be brought back to the starting gate.

2. The Commission's ruling on the "secret" agreements means that Qwest has been violating Section 252 for several years and the Application should therefore be denied.

The Commission's recent order on Qwest's petition for declaratory ruling, in which the Commission found that many of the types of previously unfiled contractual agreements or provisions thereof that Qwest entered into with CLECs are required to be filed with the state commissions and made available to other carriers in accordance with section 252 of the Act,<sup>44</sup> means that Qwest has been violating section 252 of the Act for several years. As such, Qwest's Application must be denied.

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*Fixed Microwave Service Authorization and Modifications*, WT Docket No. 96-41, 15 FCC Rcd. 25050, ¶¶ 12-41 (2000)(denying an application for private operational fixed microwave service ("OFS") facilities where the applicant was prematurely providing OFS service without prior authorization and misrepresented its operations to the Commission). *See also* "The Failure of Good Intentions: The Collapse of American Telecommunications After Six Years of Deregulation," J. Gregory Sidak, American Enterprise Institute, October 1, 2002; [http://papers.ssrn.com/sol3/delivery.cfm/SSRN\\_ID335180\\_code021001500.pdf?abstractid=335180](http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID335180_code021001500.pdf?abstractid=335180) (stating that, as a result of WorldCom's accounting fraud, "to be true to its own precedent, the FCC should issue WorldCom a "notice to show cause" why the agency should not revoke all of WorldCom's licenses and certifications").

<sup>44</sup> *See In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope and Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276 (rel. Oct. 4, 2002)(*"Secret Agreements Order"*). While the Commission left it to the states to decide which specific agreements must be filed in accordance with the Commission's statutory interpretation and directives, *see Secret Agreements Order* at ¶7, the *Secret Agreements Order* makes clear that most of the types of agreements that Qwest had sought to exclude from its section 252 obligations are, in fact, interconnection agreements subject to the requirements of section 252.

Section 252 of the Act requires local exchange carriers to submit interconnection agreements to the appropriate state commission for approval and, upon approval, to make available any interconnection, service or network element provided under the agreement to other requesting telecommunications carriers.<sup>45</sup> The purpose of the section 252 filing requirement is to ensure that interconnection agreements are not contrary to the public interest or the terms and conditions of the Act and do not discriminate against other telecommunications carriers not a party to the agreement.<sup>46</sup> In other words, Congress and this Commission made clear that the rates, terms and conditions of interconnection agreements must be made available to all CLECs on a non-discriminatory basis, permitting carriers to “pick and choose” the agreements or portions thereof to adopt for their own operations.

Notwithstanding this statutory and regulatory mandate, Qwest selectively determined to exclude from its 252 filing and “pick and choose” obligations certain agreements it had entered into with CLECs. Qwest crafted creative names for such agreements in an attempt to take them outside of its 252 obligations – dressing them up as “Settlement Agreements,” “Trade Secret Stipulations,” “Trial Agreements,” “Implementation Plans,” “Service Level Agreements” and “Escalation Procedures and Business Solutions Agreements” – notwithstanding the obvious fact that they related to Qwest’s obligations under sections 251(b) and (c) of the Act and were therefore “interconnection agreements” for purposes of the Act.<sup>47</sup> Some agreements were oral

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<sup>45</sup> 47 U.S.C. §§ 252 (a)(1), (e)(1) & (i).

<sup>46</sup> 47 U.S.C. § 252(e)(2).

<sup>47</sup> In fact, in at least one instance, Qwest filed a misleading settlement document with the state commission to hide another “confidential” agreement. *See In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197, 6-2500-14782-2, Findings of Fact, Conclusions, Recommendation and Memorandum, at 38-39 (issued Sept. 20, 2002)(“*Minnesota ALJ*”).

and at least one agreement was a total sham, designed to hide a preferred discount provided under another agreement.<sup>48</sup> Qwest provided preferential treatment to the CLECs party to the agreements, to the exclusion of other carriers.<sup>49</sup> In return for this preferential treatment, in some instances, the CLECs agreed to abstain from opposing Qwest's applications to provide long distance services, as well as to remain neutral on Qwest's other regulatory initiatives.<sup>50</sup> Stated differently, Qwest unlawfully bought the silence of competitors by suborning their opposition.

The Commission rightfully saw through Qwest's conduct and ruled that many of the types of agreements (or provisions thereof) that Qwest had unilaterally excluded from its 252 filing obligations are indeed "interconnection agreements" subject to the obligations of section 252.<sup>51</sup> The Commission found that "[c]onsidering the many and complicated terms of interconnection typically established between an incumbent and competitive LEC, we do not believe that section 252(a)(1) can be given the cramped reading that Qwest proposes."<sup>52</sup> Specifically, the Commission ruled that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection

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*Decision*").

<sup>48</sup> *Id.* at ¶¶ 126, 316. *See also* Touch America's Reply Comments in WC Docket Nos. 02-148 and 02-189.

<sup>49</sup> For instance, certain select CLECs received favorable provisioning terms, including an on-site Qwest provisioning teams, preferential escalation and dispute resolution procedures not otherwise granted to other carriers or discounted or favorable rates for services or network elements.

<sup>50</sup> Qwest's largest two wholesale customers, McLeod and Eschelon, agreed not to oppose or Qwest's efforts regarding 271 approval, and five CLECs agreed to withdraw opposition to the Qwest/US WEST merger. *See Minnesota ALJ Decision* at ¶¶ 361-63.

<sup>51</sup> *Secret Agreements Order* at 5.

<sup>52</sup> *Id.*

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agreement that must be filed pursuant to section 252(a)(1).<sup>53</sup> The Commission further found that dispute resolution and escalation provisions are not *per se* outside the scope of section 252(a)(1), as Qwest had contended, and that “settlement agreements” that contain ongoing obligations related to sections 251(b) or (c) must be filed pursuant to section 252(a)(1).<sup>54</sup> Further, the Commission found that its interpretation “directly flows from the language of the Act,” highlighting Qwest’s blatant misuse of the process. Likewise, an administrative law judge of the Minnesota Public Utilities Commission recently found that Qwest “knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required [the agreements] to be filed with the Commission but intentionally did not make the required filing” and “[b]y failing to make [the agreements] available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.”<sup>55</sup>

When its conduct was revealed and its back was against the wall in its efforts to obtain 271 approval, Qwest belatedly agreed to file certain of the agreements and make them available to competitors. That is, Qwest reluctantly agreed to meet its statutory obligations, albeit not without a fight. That fight is over, and Qwest has lost. It is now indisputable that Qwest has been violating section 252 for several years.<sup>56</sup> Qwest’s agreement to comply on a going-forward basis is irrelevant. This violation of federal law and regulations mandates that Qwest’s

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<sup>53</sup> *Id.* at 4-5 (emphasis in original).

<sup>54</sup> *Id.* at 5-6.

<sup>55</sup> *Minnesota ALJ Decision* at ¶¶ 58-59, 65-67, 75-77, 86-88, 103-105, 113-117, 137-140, 148-50, 164-67, 184-187, 196-98, 205-07, 212-14, 220-23, 228-31, 240-42, 248-50, 255-58, 263-66, 280-82, 290-91, 302-04, 310-13, 342-44, 353-54.

<sup>56</sup> Indeed, to the extent that certain of the agreements provided discounts to tariffed services, such as switched access services, Qwest’s conduct likewise violates state and federal law and the filed rate doctrine and may be considered an unlawful rebate under section 203 of the Act, 47 U.S.C. § 203. *See, e.g., Minnesota ALJ Decision* at ¶319.

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Application must be denied.<sup>57</sup> Indeed, the DoJ supported this finding in its evaluations of the original applications. With respect to the unfilled agreements issue, the DoJ stated that “[i]f the Commission finds that a violation has occurred, sanctions may be appropriate and could include suspension or revocation of any section 271 authority that the Commission may have granted in the interim.”<sup>58</sup> As recently put by the Administrative Law Judge of the Minnesota Public Utilities Commission:

Non-discrimination by ILECs is a bedrock principle of the Act. The filing of interconnection agreements, and the pick and choose requirements of Section 252, give life to that principle. By not filing the 12 agreements . . . Qwest knowingly prevented other CLECs from picking and choosing their provisions. This demonstrates a hostility to the non-discrimination concept and raises serious questions about how Qwest will cooperate with local competition efforts in the future.<sup>59</sup>

As set forth more fully in Touch America’s filings in connection with the original applications, Qwest not only circumvented the section 252 process but, by doing so, it tainted and undermined the performance data relied upon in this proceeding and, consequently, the reliability of the record. For instance the so-called “Service Level Agreement” that Qwest entered into with Covad provided Covad with advantageous provisioning arrangements and

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<sup>57</sup> See *Michigan 271 Order* at ¶ 397; *In the Matter of the Applications of TeleSTAR, Inc.*, 2 FCC Rcd. 5, at ¶¶30-35; *In re the Applications of Liberty Cable Co., Inc. for Private Operational Fixed Microwave Service Authorization and Modifications*, WT Docket No. 96-41, 15 FCC Rcd. 25050, at ¶¶ 12-41. See also *In the Matter of Commercial Realty St. Pete, Inc. Applications for Licenses in the Interactive Video and Data Services*, File No. 519WT0002, 11 FCC Rcd. 15374 (1996)(winner of licenses in auction was assessed a \$390,000 forfeiture for attempting to discourage other bidders from making down payments and making misstatements to the Commission in connection with its bid).

<sup>58</sup> See Evaluation of the United States Department of Justice, WC Docket No. 02-148 at 3 (filed July 23, 2002)(“DoJ Evaluation”).

<sup>59</sup> *Minnesota ALJ Decision* at ¶356. The Minnesota ALJ found that the damages to CLECs from not being able to opt into the rate discounts in certain secret agreements would amount to several million dollars just in Minnesota alone. *Minnesota ALJ Decision* at ¶374.

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performance standards and the “Trade Secret Stipulation Agreement” it entered into with Eschelon provided a dedicated provisioning team to handle order processing for Eschelon. Because these favorable terms skewed the performance data in this proceeding, Qwest’s Application should be denied.

Moreover, the recent proceedings in Minnesota have confirmed that Qwest was able to stifle carriers from voicing service-related problems during the 271 proceedings.<sup>60</sup> Such action is akin to subornation of a witness or witness tampering and must be seriously considered by the Commission as additional grounds for denial of the Application.<sup>61</sup> The Commission has long held that “[t]he bedrock requirement for absolute truth and candor from a Commission licensee or from a licensee applicant is the Commission’s quintessential regulatory demand.”<sup>62</sup> Further, “[a]n intentional lack of candor with respect to matters affecting an applicant’s basic eligibility status is misconduct that thoroughly disqualifies applicants for the “public trust” embodied in a

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<sup>60</sup> *Id.* at ¶¶369-70.

<sup>61</sup> *See In the Matter of Applications of WIOO, Carlisle, Pennsylvania for Construction Permits*, Docket No. 19468, File No. BPH-6572, and Docket No. 19471, File No. BPH-7404, 54 FCC 2d 712, n. 123 (rel. March 21, 1974)(“obtaining contradictory statements under circumstances that may constitute a crime (subornation of perjury), reflects serious discredit upon both applicants and, in itself, could reasonably be urged as a basis for disqualifying them both”); *In the Matter of WIOO, Inc., Carlisle, Pennsylvania for Construction Permit*, Docket No. 19468, File No. BPH-6572, 54 FCC 2d 692, 703 n. 25 (rel. August 8, 1975)(finding that, while it may be not be assumed that payment *per se* indicates that a party has attempted to or succeeded in eliciting false testimony, if a license applicant paid an individual for an affidavit to support the application, the applicant’s solicitation of affidavits attesting to the contrary would be a knowing act of subornation). *See also In the Matter of Applications of Catocin Broadcasting Corp. of New York*, 2 FCC Rcd. 2126, 2136-38 (Rev. Bd. 1987); *In the Matter of the Applications of TeleSTAR, Inc.*, 2 FCC Rcd. 5 (Rev. Bd. 1987); *Mid-Ohio Communications, Inc.*, 104 FCC 2d 572 (rev. Bd. 1986)(each holding that where an applicant has knowingly attempted to mislead the Commission on an underlying matter of decisional import, the Commission has consistently and completely disqualified the untrustworthy applicant).

<sup>62</sup> *See, e.g., In the Matter of the Applications of California Broadcasting Corp.*, 2 FCC Rcd. 4175, 4176 (Rev. Bd. 1987); *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981); *WHW*

Commission license.<sup>63</sup> Qwest's efforts to silence its opposition through secret agreements that it hid from regulators and competitors, which effectively served to alter the record in this proceeding, as well as its history of past violations and anti-competitive behavior,<sup>64</sup> is grounds for dismissal of the Application.

**C. Qwest's newly submitted data continues to reflect low volumes of commercial activity and inadequate performance.**

Qwest states that competitive carriers continue to maintain market shares comparable to those documented in Qwest's original applications and boasts that CLEC volumes, such as the number of stand-alone UNE loops in service, have increased in every one of the nine states in the months since Qwest's original applications were filed.<sup>65</sup> Qwest further contends that the new performance data for the months of June through August reflects Qwest's continued "excellent performance." Qwest's data belie its position.

While it should come as no surprise that CLEC volumes have increased over the past three months, the fact remains that the baseline volume is low and the incremental increases minimal. In its original applications, Qwest claimed to have provisioned 112,000 stand-alone loops in the states of Colorado, Idaho, Iowa, Nebraska and North Dakota, and 81,000 stand-alone loops in the states of Montana, Utah, Washington and Wyoming, for a total of 193,000 loops for

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*Enterprises, Inc. v. FCC*, 753 F.2d 1132 (D.C. Cir. 1985).

<sup>63</sup> *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981); *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132 (D.C. Cir. 1985); *Sea Island Broadcasting Corp. of S.C. v. FCC*, 627 F.2d 240 (D.C. Cir. 1980).

<sup>64</sup> *Minnesota ALJ Decision* at ¶377. Qwest has also been accused in many of states of consumer-related violations, including placing unauthorized charges on telephone bills and misrepresenting its services to customers. The settlements forced by the violations continue, most recently in the state of Idaho. See "Attorney General Gains Refunds for Qwest Customers in Consumer Protection Settlement," October 2, 2002, State of Idaho, Office of the Attorney General, [http://www2.state.id.us/ag/newsrel/2002/pr\\_oct022002.htm](http://www2.state.id.us/ag/newsrel/2002/pr_oct022002.htm).

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the nine-state region.<sup>66</sup> As Touch America demonstrated in its filings in response to the original applications, this number – which represents total commercial activity *in 9 states* – pales in comparison to the 164,000 stand-alone loops that Verizon had in place a year ago *in the state of Pennsylvania alone* to support its 271 application<sup>67</sup> and even the 80,000 loops that BellSouth had provisioned in the state of Georgia at the time it filed its 271 application for that state.<sup>68</sup> The minimal increases in the commercial activity over the past several months fail to demonstrate that Qwest will be able to meet its performance obligations when real commercial activity begins in these states. Qwest has not proven that its processes and systems are scalable and will be adequate to meet volumes of significant commercial activity.

Qwest's assertions of continued "excellent performance" are also not borne out by its data. For example, Qwest's electronic flow-through continues to be sub par, requiring significant manual processing for CLEC orders. For instance, in the state of Colorado alone, electronic flow-through percentage for unbundled loops between the months of May and June fell from 53% to 47% for orders submitted via IMA and from 69% to 53% for orders submitted via EDI.<sup>69</sup> Similarly, the electronic flow-through percentage for LNP orders fell from 29% to

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<sup>65</sup> Application at 5.

<sup>66</sup> In fact, as demonstrated by the filings in response to the original applications, there is good reason to believe that even these numbers have been significantly inflated. *See, e.g.*, Touch America Reply, WC Docket No. 02-148, at 7 (filed July 29, 2002).

<sup>67</sup> *In the Matter of Application of Verizon Pennsylvania, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, 16 FCC Rcd. 17420, 17462 (2001).

<sup>68</sup> *In the Matter of Joint Application by BellSouth Corporation for Provision of In-Region, InerLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, 17 FCC Rcd. 9018, 9144 (2002).

<sup>69</sup> Qwest Performance Results for June-July (Colorado) at p. 73. In fact, flow-through of the EDI orders continued to fall in the month of July to 43%.

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24% for IMA orders and from 69% to 64% for EDI orders between May and June.<sup>70</sup> That is, the already low percentage of flow-through orders got even lower. Accordingly, even more CLEC orders required manual processing, thereby allowing for human errors. Although Qwest has proposed a new manual service order accuracy measure (PID PO-20) and has purported to put in place other system measures to ensure manually-processed service orders are processed accurately,<sup>71</sup> the performance measure is virtually untested and, to date, has not been incorporated into the PID administration process, and the system measures have only been recently adopted, therefore raising questions as to their efficacy.<sup>72</sup> In the meantime, competitors can only hope that the large number of orders that fall out for manual processing are properly processed.

In addition, Qwest's billing problems persist. Qwest admits that in August 2002, Qwest missed two key billing parity standards in nearly all of the states.<sup>73</sup> As demonstrated in Touch America's previously-filed comments, Qwest's billing issues are nothing new and will likely prove to get worse. In addition, Qwest has proffered no additional credible information pertaining to electronic auditability issues raised in connection with the original applications. Qwest merely states that it is "continuing to work on its BOS offering," and that it will "continue to implement improvements" and "minimize and resolve problems as they arise in the future"<sup>74</sup>

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<sup>70</sup> *Id.* at p. 75.

<sup>71</sup> *See* Addendum to Application, Tab 1 at 2-4.

<sup>72</sup> Further, although Qwest asserts that during the three months in which PO-20 has been in existence, Qwest accurately processed over 90% of resale and UNE-P POTS LSRs and over 95% of unbundled loop LSRs, Qwest fails to identify over what time period these orders were processed. *See* Addendum to Application, Tab 1 at 2. A lengthy order process interval is akin to a failure to process the order.

<sup>73</sup> Addendum to Application, Tab 5, at 17.

<sup>74</sup> Addendum to Application, Tab 5, at 5 and 14.

Qwest also adopts this lackadaisical “we’ll get better” approach with respect to problems related to repair services for line sharing outages<sup>75</sup> and conversions from Centrex 21 to UNE-P POTS or Resale POTS,<sup>76</sup> as well as router testing options in connection with provisioning line shared loops.<sup>77</sup> Promises of future performance are not sufficient. Instead, Qwest’s Application should be denied until these matters are resolved.<sup>78</sup>

Finally, certain of Qwest’s other data also demonstrate inadequate performance on material matters. For instance, with respect to PID PO-9, the percentage of late orders for which Qwest provides timely jeopardy notices, Qwest acknowledges that it did not always meet parity and defends itself by saying that virtually the only product for which Qwest did not meet the parity standard between January and August, 2002 was unbundled loops.<sup>79</sup> Unbundled loops are the most fundamental network element for CLECs and, as such, routine lapses with respect to loops cannot be trivialized. In addition, Qwest’s data for unbundled analog loop installations in Colorado show that Qwest’s performance for CLECs for delayed days for non-facility reasons continued to be far worse than Qwest’s performance for its own customers.<sup>80</sup> Also, Qwest’s performance in Colorado for meeting installation commitments and installation intervals for local interconnection installations indicates that Qwest provided discriminatory treatment to its competitors.<sup>81</sup>

### III. CONCLUSION

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<sup>75</sup> See Addendum to Application, Tab 8 at 2.

<sup>76</sup> See Addendum to Application, Tab 14 at 1.

<sup>77</sup> See Addendum to Application, Tab 9 at 1-2.

<sup>78</sup> See DoJ Evaluation at 23 (“[a]ccurate and auditable electronic bills are an important factor in making local telecommunications markets fully and irreversibly open to competition”).

<sup>79</sup> See Addendum to Application, Tab 4, at 1-2.

<sup>80</sup> See Qwest Performance Results for June-July (Colorado) at pp. 161, 163.

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Qwest's new Application continues the same charade from the prior Applications. Like before, the Commission should not be drawn in by Qwest's prevarications and legal maneuvering. Qwest's new long distance affiliate must be rejected for what it is – a sham – and Qwest should be required to await the completion of its accounting analysis and the restatement of its earnings before being permitted to enter the in-region, long distance market. QC and QLDC must both be GAAP compliant for state and federal regulators to be equipped with the tools necessary to detect and combat cross-subsidization and discrimination. Moreover, Qwest's violations of section 252 and 271 of the Act should be "show stoppers." The Commission must not turn a blind eye to Qwest's unlawful conduct and certainly must not tacitly condone such activity through the approval of the Application. In short, Qwest's new Application is as deficient as its previous applications and, accordingly, it must be denied.

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<sup>81</sup> *Id.* at 38-39. These are just examples of *some* of Qwest's deficient performance.

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Respectfully submitted,

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October 15, 2002

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**Exhibit A**

<b>Date</b>	<b>Docket</b>	<b>Filing</b>
June 28, 2002	WC Docket No. 02-148	Letter regarding <i>ex parte</i> meetings
July 3, 2002	WC Docket No. 02-148	Opposition
July 16, 2002	WC Docket No. 02-148	<i>Ex parte</i> letter
July 25, 2002	WC Docket No. 02-148	<i>Ex parte</i> letter
July 29, 2002	WC Docket No. 02-148	Reply Comments
August 5, 2002	WC Docket No. 02-148	Letter regarding <i>ex parte</i> meetings
August 28, 2002	WC Docket No. 02-148	Comments
August 30, 2003	WC Docket No. 02-148	Reply
August 30, 2002	WC Docket Nos. 02-148 & 02-189	Letter regarding <i>ex parte</i> meetings
September 4, 2002	WC Docket No. 02-148	<i>Ex parte</i> letter
September 4, 2002	WC Docket Nos. 02-148 & 02-189	Supplemental Comments
September 5, 2002	WC Docket Nos. 02-148 & 02-189	<i>Ex parte</i> letter
September 5, 2002	WC Docket Nos. 02-148 & 02-189	<i>Ex parte</i> letter
September 6, 2002	WC Docket Nos. 02-148 & 02-189	<i>Ex parte</i> letter
September 6, 2002	WC Docket Nos. 02-148 & 02-189	<i>Ex parte</i> letter
September 10, 2002	WC Docket Nos. 02-148 & 02-189	<i>Ex parte</i> letter
August 1, 2002	WC Docket No. 02-189	Opposition
August 26, 2002	WC Docket No. 02-189	Reply

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**Exhibit B**

**Qwest's July 28, 2002 Press Release**



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## **Qwest Communications Provides Current Status Of Ongoing Analysis Of Its Accounting Policies And Practices**

### **Company Withdraws Guidance For Full-Year 2002; Will Report Results For Second Quarter 2002 And Guidance For 2002 On August 8**

**DENVER, July 28, 2002** – Qwest Communications International Inc. (NYSE: Q) today announced the current status of the ongoing analysis of its accounting policies and practices, including its policies and practices with respect to revenue recognition in connection with sales of optical capacity assets (IRUs). Earlier this year the company and its board of directors began an analysis of, among other things, revenue recognition and accounting treatment for optical capacity sales (particularly sales to customers from which the company agreed to purchase optical capacity assets), the sale of equipment by the company to certain customers and changes in the production schedules and lives of some of its directories.

Based on the analysis to date, the company has determined that it has in some cases applied its accounting policies incorrectly with respect to certain optical capacity asset sale transactions in 1999, 2000 and 2001. Certain adjustments may be required to correct the period in which the revenue was recognized with respect to some transactions, and other adjustments may be required to reverse the recognition of revenue with respect to other transactions. In addition, further adjustments are required to account for certain sales of equipment in 2000 and 2001 that the company had previously determined had been recorded in error. In the fourth quarter of 2001, the company reduced revenue and adjusted EBITDA related to these equipment transactions. The company has also determined that in a limited number of transactions it did not properly account for certain expenses incurred for services from telecommunications providers in 2000 and 2001.

The company is continuing to analyze its accounting policies and practices in consultation with its new auditor, KPMG LLP. When the company completes its analyses, it expects to restate its financial statements for prior periods. The company will attempt to conclude these analyses promptly. However, as a result of the change in the company's auditors and the ongoing investigation by the Securities and Exchange Commission, the company cannot state with certainty when a restatement will be completed. In the meanwhile, the company will seek to comply with its reporting requirements under the securities laws and the rules of the New York Stock Exchange in light of the constraints on completing the restatement.

The company also announced it is withdrawing its financial guidance for the full year 2002 as management reassesses the impact of continuing weakness in the telecommunications sector and the regional economy in the company's 14-state local service area, as well as competitive pressure. The company announced that it will report its results for the second quarter of 2002 and revised guidance for the full year on Thursday, August 8, 2002.

### **Optical Capacity Sales**

The company analyzed its application of the revenue recognition policies approved by its previous auditor, Arthur Andersen LLP, with respect to optical capacity sales and concluded that those policies were incorrectly applied to optical capacity asset transactions in 1999, 2000 and 2001 which totaled approximately \$1.16 billion in recognized revenue, and which represented approximately 18 percent of the optical capacity asset transactions in this period. Of this amount, revenue of \$591 million was recognized by the company after June 30, 2000, the effective date of the merger of Qwest and U S WEST Inc. (the company that was deemed the accounting acquirer and whose financial statements were carried forward as those of the combined company). \$571 million was recognized by Qwest before June 30, 2000 and therefore not included in the company's historical financial statements. KPMG has not participated in this initial analysis of these transactions.

The \$591 million of revenue recognized with respect to the optical capacity asset sales identified in the company's initial analysis represented 1.4 percent and 1.8 percent of total revenue in 2000 and 2001, respectively, and 24.5 percent and 34.5 percent, respectively, of total revenue from optical capacity asset sales in those years. The gross margin for those transactions represented 1.7 percent and 2.4 percent of total adjusted EBITDA in 2000 and 2001, respectively, and 20.2 percent and 35.2 percent of total gross margin for optical capacity asset sales in those years.

The company, in consultation with KPMG, is now analyzing the application of the company's accounting policies to all of the company's optical capacity sales transactions. The company, in consultation with KPMG, is also analyzing the appropriateness of the accounting policies themselves. The company believes that, whether as a result of these continuing analyses or the ongoing investigation by the SEC, the company may conclude that the company recognized revenue inappropriately with respect to the transactions identified in the initial analysis and other optical capacity sales and that the amount of the additional revenue adjustments may be significant. For example, if the company were to determine that certain of the policies as applied to all optical capacity sales were inappropriate, the company may be required to restate its financial statements with respect to optical capacity sales affected by such policies, which could be all optical capacity sales in the relevant periods.

The company has previously disclosed in its annual report on form 10-K that the amounts of revenue and gross margin attributable to all optical capacity sales in 2000 and 2001 were as follows: (1) revenues of \$468 million, or 2.8 percent of total revenue, in 2000 and \$1.013 billion, or 5.1 percent of total revenue in 2001 and (2) gross margin of \$232 million, which is 3.4 percent of adjusted EBITDA, in 2000 and \$486 million, which is 6.6 percent of adjusted EBITDA, in 2001. On an after-tax basis, the gross margin of all optical capacity sales was approximately \$140 million and \$290 million in 2000 and 2001, respectively. Any adjustment of all revenue for optical capacity sales may have a material affect on operating income, net income or earnings per share. Depending upon the ultimate determination of the appropriate accounting treatment, any decreases in these amounts in the periods in which they have been recorded would be partially offset by the amounts that would be recognized over the lives of the agreements if the optical capacity asset sales were instead treated as operating leases or services contracts. The company has previously disclosed that it does not plan on any sales of optical capacity in 2002 that would be treated as sales type leases and require recognition of revenue up front.

The company expects to restate its financial statements for prior periods when it

completes its analyses of its accounting policies and practices for optical capacity sales. At this time, the company is unable to estimate the effect of the revenue adjustments in any period, since the determination of the amounts of revenue that may be reversed altogether or deferred to subsequent periods will depend upon which accounting policies, if any, are determined to be inappropriate.

### **Equipment Sales**

The expected restatement of the company's financial statements will also include adjustments for three transactions relating to the sale by the company of equipment to other parties. Two transactions involved related agreements to provide services to or buy services from the company. The variances that were identified were the result of the determination that the revenue and/or profit in these transactions were incorrectly recognized upfront and should be deferred. The total amount of revenue and adjusted EBITDA of all these equipment sales in 2000 and 2001 is as follows: (1) revenues of \$100 million or 0.6 percent of total revenue, in 2000 and \$183 million, or 0.9 percent of total revenue, in 2001 and (2) adjusted EBITDA of \$80 million, which is 1.2 percent of adjusted EBITDA, in 2000 and \$82 million, which is 1.1 percent of adjusted EBITDA, in 2001. The company has already reduced revenues and adjusted EBITDA by \$73 million and \$124 million, respectively, in the fourth quarter of 2001 to adjust for these transactions. The proposed further adjustments either defer the revenue and gross margin originally recognized up front or adjust the previous correction in the appropriate quarter. The company is continuing to discuss the accounting for these transactions with KPMG.

### **QwestDex**

The company, in consultation with KPMG, is also analyzing certain accounting policies and practices with respect to its QwestDex directories business, including, among other things, the changes in the production schedules and lives of some of its QwestDex directories. If the company were to determine that any of these policies and practices were inappropriate, the company believes a restatement would include adjustments as to the timing of the revenue recognized under such policies and these adjustments may be significant.

### **Telecommunications Services**

During 2000 and 2001 the company received services from third party telecommunications providers and paid such providers but did not record the cost entry for such services properly. The company has preliminarily estimated that 2000 costs were overstated by \$15 million, which is 0.2 percent of adjusted EBITDA and 2001 costs were understated by approximately \$113 million, which is 1.5 percent of adjusted EBITDA.

### **CEO and CFO Statements**

An order issued by the SEC in June 2002 requires the chief executive officer and chief financial officer of the company, and 944 other publicly traded companies, to state or assert (or to explain why they are unable to state) in a filing with the SEC by August 14, 2002 that, to the best of their knowledge (based upon a review of the respective company's annual report on Form 10-K for the most recent fiscal year and all reports on Form 10-Q, all reports on Form 8-K and all definitive proxy materials of the company filed with the SEC after the Form 10-K and except as corrected or supplemented in a subsequent covered report), the covered reports (1) did not contain

an untrue statement of material fact as of the end of the period covered by the respective report (or in the case of a report on Form 8-K or definitive proxy materials, as of the date on which it was filed with the SEC) and (2) did not omit to state a material fact necessary to make the statements in the respective report, in light of the circumstances under which they were made, not misleading as of the end of the period covered by the report (or in the case of a report on Form 8-K or definitive proxy materials, as of the date on which it was filed). The company's chief executive officer and chief financial officer joined the company in June 2002 and July 2002, respectively.

The company said that these officers currently intend to explain in the sworn written statements, which they intend to submit to the SEC by August 14, 2002, that they will be unable to make the statement specified in the SEC order because of the expected restatement of the company's financial statements, the ongoing analyses by the company and KPMG of the accounting policies and practices of the company and the ongoing investigation by the SEC, among other reasons.

### **Review of Second Quarter Financial Statements**

KPMG has informed the company that due to the identification of the adjustments that the company believes it is required to make in its financial statements, the ongoing analyses by the company and KPMG of the accounting policies and practices of the company and the inability of the company's chief executive officer and the chief financial officer to make the assertion referred to above, KPMG is not able to complete all the procedures necessary to finalize its review of the financial statements to be included in the second quarter 2002 report on Form 10-Q required by the regulations under the federal securities laws. Although the company does not anticipate that the failure to obtain this review will have a material adverse effect on the company, there can be no assurances in this regard.

### **Update on SFAS 142 Impairment Charge**

As stated in the company's Form 10-Q for the period ended March 31, 2002, the company expected an impairment of the carrying amount of its goodwill upon adoption of the transition provisions of FASB Statement No. 142. That impairment was estimated to be in the range of \$20 to \$30 billion. The methodology used to calculate this range is being evaluated by our new auditors KPMG. Prior to filing its Form 10-Q for the period ended June 30, 2002, the company will either have to determine whether any changes to the methodology will require a change in the previously disclosed estimate or the company will have to update its disclosure of the estimated impairment charge.

**Definitions:** For purposes of this release, "adjusted earnings before interest, taxes, depreciation and amortization" ("adjusted EBITDA") does not include non-recurring and non-operating items, which for the relevant periods includes restructuring charges, merger-related and other charges, asset write-offs and impairments, gains/losses on the sale of investments and fixed assets, gains/losses on sales of rural exchanges, and changes in the market values of investments. The company uses adjusted EBITDA as a measure of its operating performance. The company believes that adjusted EBITDA is important to investors in the company's debt and equity securities and to analysts that cover these securities because it is one measure of the income generated that is available to service debt. Adjusted EBITDA does not represent cash flow for the periods presented and should not be considered as an alternative to cash flows as a source of liquidity. Moreover, the items excluded from the calculation of adjusted EBITDA are significant components in understanding and assessing the company's financial

performance. The company's definition of adjusted EBITDA is not necessarily comparable with EBITDA (earnings before interests, taxes, depreciation and amortization) or adjusted EBITDA as used by other companies or with similar concepts used in the company's debt instruments. Adjusted EBITDA is reported as a complement to the financial results in accordance with generally accepted accounting principles and is presented to provide investors additional information concerning the company's operations.

## **About Qwest**

Qwest Communications International Inc. (NYSE: Q) is a leader in reliable, scalable and secure broadband data, voice and image communications for businesses and consumers. The Qwest Macro Capacity® Fiber Network, designed with the newest optical networking equipment for speed and efficiency, spans more than 175,000 miles globally. For more information, please visit the Qwest Web site at [www.qwest.com](http://www.qwest.com).

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### **###**

This release may contain projections and other forward-looking statements that involve assumptions, risks and uncertainties. Readers are cautioned not to place undue reliance on these statements, which speak only as of the date of this release. These statements may differ materially from actual future events or results. Readers are referred to the documents filed by Qwest Communications International Inc. (together with its affiliates, "Qwest", "we" or "us") with the Securities and Exchange Commission (the "SEC"), specifically the most recent reports which identify important risk factors that could cause actual results to differ from those contained in the forward-looking statements, including but not limited to: the duration and extent of the current economic downturn in our 14-state local service area, including its effect on our customers and suppliers; any adverse outcome of the SEC's current inquiries into Qwest's accounting policies, practices and procedures; adverse results of increased review and scrutiny by regulatory authorities, media and others (including any internal analyses) of financial reporting issues and practices or otherwise; rapid and significant changes in technology and markets; failure to achieve the projected synergies and financial results expected to result from the acquisition of U S WEST, and difficulties in combining the operations of the combined company; our future ability to provide interLATA services within our 14-state local service area; potential fluctuations in quarterly results; volatility of Qwest's stock price; intense competition in the markets in which we compete; changes in demand for our products and services; adverse economic conditions in the markets served by us or by companies in which we have substantial investments; dependence on new product development and acceleration of the deployment of advanced new services, such as broadband data, wireless and video services, which could require substantial expenditure of financial and other resources in excess of contemplated levels; higher than anticipated employee levels, capital expenditures and operating expenses; adverse changes in the regulatory or legislative environment affecting our business; adverse developments in commercial disputes or legal proceedings; and changes in the outcome of future events from the assumed outcome included by Qwest in its significant accounting policies. The information contained in this release is a statement of Qwest's present intention, belief or expectation and is based upon, among other things, the existing regulatory environment, industry conditions, market conditions and prices, the economy in general and Qwest's assumptions. Qwest may change its intention, belief or expectation, at any time and without notice, based upon any changes in such factors,

in Qwest's assumptions or otherwise. The cautionary statements contained or referred to in this release should be considered in connection with any subsequent written or oral forward looking statements that Qwest or persons acting on its behalf may issue. This release may include analysts' estimates and other information prepared by third parties for which Qwest assumes no responsibility. Qwest undertakes no obligation to review or confirm analysts' expectations or estimates or to release publicly any revisions to any forward-looking statements to reflect events or circumstances after the date hereof or to reflect the occurrence of unanticipated events.

The Qwest logo is a registered trademark of, and CyberCenter is a service mark of, Qwest Communications International Inc. in the U.S. and certain other countries.

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**Exhibit C**

**Qwest's September 22, 2002 Press Release**



[Back to Press Releases](#)

## **Qwest Communications Updates Status Of Analysis Of Optical Capacity Asset Transaction Accounting Policies And Procedures**

### **Company Announces Restatement of Approximately \$ 950 Million in Revenue from Optical Capacity Asset Transactions**

**DENVER, September 22, 2002** — Qwest Communications International Inc. (NYSE: Q) today announced further restatement of its 2000 and 2001 financial statements as a result of its ongoing analysis of the complex accounting policies and practices relating to revenue recognition and accounting treatment for exchanges and sales of optical capacity assets (IRUs). In restating its 2000 and 2001 financial statements with respect to these matters to be in conformance with generally accepted accounting principles, the company will reverse \$ 950 million in revenues and related costs related to exchanges of optical capacity assets previously recognized. Some of the transactions included in this restatement were the subject of the company's July 28, 2002, announcement of determinations reached as of that date.

The company historically accounted for contemporaneous exchanges of optical capacity assets based on accounting policies approved by its previous auditor Arthur Andersen LLP. After analyzing its prior policies and practices, including the underlying accounting records, and in consultation with its new auditors, KPMG LLP, the company has concluded its policies and practices do not support the accounting treatment to allow for recognition of revenue from these exchange transactions. In conducting its analysis, the company considered discussions it had in late July 2002 with the staff of the Office of the Chief Accountant of the Securities and Exchange Commission.

The company also historically accounted for its sales of optical capacity assets for cash to third parties based on accounting policies approved by Arthur Andersen. Qwest has preliminarily concluded in consultation with KPMG that its accounting practices intended to follow these policies do not support the historical accounting treatment with respect to these optical capacity asset sales. The accounting for each of these transactions is being reviewed to assess whether and to what extent a restatement is required. Consequently, in connection with the company's restatement of its financial statements for 2000 and 2001 the approximately \$ 531 million in revenue previously recognized from these sales of optical capacity assets for cash may require adjustment; however, the magnitude of the adjustments and the periods affected have not yet been determined.

This announcement relates to optical capacity asset transactions recorded in periods following the merger of Qwest and U S WEST, Inc. on June 30, 2000. Approximately \$ 1.48 billion in total revenue was recognized in these periods from all IRU transactions and is made up of the \$ 950 million from exchanges of optical capacity assets and the \$ 531 million from sales of optical capacity assets for cash.

Out of the \$ 1.48 billion in total revenue, \$ 1.016 billion and \$ 464 million were recognized in 2001 and 2000, respectively. These represented 5.2 % and 2.8 % of

total reported revenue in 2001 and 2000, respectively. The company recognized \$ 490 million and \$ 231 million of gross margin from optical capacity asset transactions in 2001 and 2000, respectively, which represented 6.7 % and 3.3 % of total reported adjusted EBITDA in 2001 and 2000, respectively. Of the total amounts recognized from all optical capacity asset transactions in each year, the company has concluded that \$ 685 million and \$ 265 million in revenues from exchanges of optical capacity assets will be reversed in 2001 and 2000, respectively, and \$ 331 million and \$ 200 million in sales of optical capacity assets for cash in those respective periods are subject to review to determine whether adjustment is required. The amounts for 2000 represent only those transactions entered into after the merger and the percentages are based upon the full year results as reported in the company's annual report on Form 10-K. The company has previously disclosed that it does not anticipate any sales of optical capacity assets in 2002 that would be impacted by the announcement today.

The restatement and possible adjustment of revenues described in this announcement do not include revenues reported by Qwest with respect to optical capacity asset transactions before the merger. Qwest generally applied these same accounting policies and practices with respect to these IRU transactions. The total revenue recognized in optical capacity asset transactions in 1999 and 2000 prior to the merger is approximately \$ 1.32 billion. The revenue recognized from pre-merger optical capacity asset transactions are not reflected in the company's financial statements since U S WEST was deemed the accounting acquirer in the merger.

The restatement announced today includes some of the optical capacity asset transactions reflected in the \$ 1.16 billion of revenues from similar transactions in 1999, 2000 and 2001 covered in the company's July 28 announcement. Out of that amount, the company announced that \$ 591 million in post-merger revenues was the subject of restatement by the company as of that date. This announcement includes an additional \$ 894 million in in post-merger revenues subject to restatement from additional transactions not covered in the previous announcement.

The company is continuing to analyze, in consultation with KPMG, its accounting policies and practices with respect to the transactions in which optical capacity assets were sold for cash and the company recognized revenue post-merger to determine the magnitude of adjustments that may be required. In addition, Qwest is continuing to analyze certain accounting policies and procedures with respect to other transactions, and KPMG has been engaged to re-audit certain historical financial statements. Although the company cannot yet disclose the magnitude of the anticipated restatement, the company considers the announcements today to represent a significant development in its ongoing assessment of its accounting policies and their application. The company cannot state with certainty when a restatement will be completed.

The company is continuing to evaluate the recoverability of the long-lived assets of its traditional telephone network and global fiber optic broadband network, along with related assets, including inventory. Once this evaluation has been completed, the company expects to record charges in the third quarter of 2002 to write-down these assets. These write-downs will reduce operating income in the third quarter of 2002 and will result in a reduction of future depreciation expense.

As previously disclosed, the company remains under investigation, including with respect to the matters that are the subject of this announcement, by the SEC and the Department of Justice. Qwest continues to cooperate with these investigations, but it cannot predict how the restatements announced today may impact their outcome.

Although the company has not had discussions with the staff of the SEC about resolution of the investigation, Qwest is optimistic that today's announcement represents a first step toward a possible resolution.

As a result of the announcements by Qwest regarding its expected restatement, the company cautions that its historical financial statements in 2000, 2001 and the first three months of 2002 should not be relied on.

**Definition:** For purposes of this release, "adjusted EBITDA" refers to adjusted earnings before interest, taxes, depreciation and amortization and does not include non-recurring and non-operating items, which for the relevant periods includes restructuring charges, merger-related and other charges, asset write-offs and impairments, gains/losses on the sale of investments and fixed assets, gains/losses on sales of rural exchanges, and changes in the market values of investments. The company uses adjusted EBITDA as a measure of its operating performance. The company believes that adjusted EBITDA is important to investors in the company's debt and equity securities and to analysts that cover these securities because it is one measure of the income generated that is available to service debt. Adjusted EBITDA does not represent cash flow for the periods presented and should not be considered as an alternative to cash flows as a source of liquidity. Moreover, the items excluded from the calculation of adjusted EBITDA are significant components in understanding and assessing the company's financial performance. The company's definition of adjusted EBITDA is not necessarily comparable with EBITDA (earnings before interests, taxes, depreciation and amortization) or adjusted EBITDA as used by other companies or with similar concepts used in the company's debt instruments. Adjusted EBITDA is reported as a complement to the financial results in accordance with generally accepted accounting principles and is presented to provide investors additional information concerning the company's operations.

### **About Qwest**

Qwest Communications International Inc. (NYSE: Q) is a leading provider of voice, video and data services to more than 25 million customers. The company's 55,000 employees are committed to the "spirit of service" and providing world-class services that exceed customers' expectations for quality, value and reliability. For more information, please visit the Qwest Web site at [www.qwest.com](http://www.qwest.com).

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balance sheet through asset sales or other transactions; any adverse outcome of the SEC's current inquiries into Qwest's accounting policies, practices and procedures; any adverse outcome of the current investigation by the U.S. Attorney's office in Denver into certain matters relating to us; adverse results of increased review and scrutiny by Congress, regulatory authorities, media and others (including any internal analyses) of financial reporting issues and practices or otherwise; the failure of our chief executive and chief financial officers to provide certain certifications relating to certain public filings; rapid and significant changes in technology and markets; failure to achieve the projected synergies and financial results expected to result from the acquisition of U S WEST, and difficulties in combining the operations of the combined company; our future ability to provide interLATA services within our 14-state local service area; potential fluctuations in quarterly results; volatility of Qwest's stock price; intense competition in the markets in which we compete; changes in demand for our products and services; dependence on new product development and acceleration of the deployment of advanced new services, such as broadband data, wireless and video services, which could require substantial expenditure of financial and other resources in excess of contemplated levels; higher than anticipated employee levels, capital expenditures and operating expenses; adverse changes in the regulatory or legislative environment affecting our business; adverse developments in commercial disputes or legal proceedings; and changes in the outcome of future events from the assumed outcome included by Qwest in its significant accounting policies. The information contained in this release is a statement of Qwest's present intention, belief or expectation and is based upon, among other things, the existing regulatory environment, industry conditions, market conditions and prices, the economy in general and Qwest's assumptions. Qwest may change its intention, belief or expectation, at any time and without notice, based upon any changes in such factors, in Qwest's assumptions or otherwise. The cautionary statements contained or referred to in this release should be considered in connection with any subsequent written or oral forward looking statements that Qwest or persons acting on its behalf may issue. This release may include analysts' estimates and other information prepared by third parties for which Qwest assumes no responsibility. Qwest undertakes no obligation to review or confirm analysts' expectations or estimates or to release publicly any revisions to any forward-looking statements to reflect events or circumstances after the date hereof or to reflect the occurrence of unanticipated events.

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CO, ID, IA, MT, NE, ND  
UT, WA AND WY**

**Exhibit D**

**Denver Post Article**

## **Qwest exec advocated dicey sale 'I will take the fall,' Mohebbi e-mail says**

By Anne C. Mulkern  
Denver Post Washington Bureau  
Tuesday, October 01, 2002 -

### **Get more**

- Click [here](#) for more information about the hearing on the House Energy and Commerce Committee Web site.

WASHINGTON - Qwest's second-highest-ranking executive encouraged employees to put through a questionable sale of fiber-optic capacity in 2000 and offered to "take the fall" if the company was caught in an audit, documents released Monday show.

The e-mails released by the House's Energy and Commerce Committee discloses a conversation between Afshin Mohebbi, president and chief operating officer of Denver-based Qwest, and Qwest sales and operations executives about the deal in question.

The committee is investigating whether Qwest's swaps of fiber-optic capacity with other telecommunications companies were made largely to beef up revenues.

Mohebbi is likely to be asked during a congressional hearing today exactly what that e-mail meant. He is one of several witnesses lawmakers will question as part of their investigation. The committee had just obtained the e-mails over the weekend and said it was unclear whether the deal was actually completed.

"We're still trying to make sense of what this means, but clearly it doesn't pass the smell test," said Ken Johnson, spokesman for Billy Tauzin, R-La., chairman of the committee.

Mohebbi referred questions to Qwest's public-relations department, which indicated that questions about the e-mail would be answered today.

Former Qwest chief executive Joe Nacchio will also testify, as will Peter Hellman, chairman of the audit committee, and chief financial officer Oren Schaffer.

Paula Smith, a former Qwest employee who was a lead plaintiff in a suit regarding the company's handling of a pension fund, is also to testify. She is expected to talk about how employee retirement portfolios were affected by the company's strategies and a subsequent tumble in Qwest's stock price.

The e-mails released Monday are a conversation between Mohebbi and David Boast, Qwest's executive vice president of planning, engineering, network and operations in 2000, and several other employees.

Employee William Felix sends an e-mail explaining that fiber-optic capacity - or indefeasible right of use - that another telecommunications company wants to buy will not be available for at least another month. Selling the capacity apparently

conflicted with Qwest's concurrent deal with Touch America, in which Qwest divested its long-distance business within its local region.

Mohebbs suggests "what if we mis-route the IRU and then route it as it is suppose to?"

Boast responds by telling Mohebbs "then all we have to do is get audited, get caught, and get screwed!"

Mohebbs responds, "I know it is risky. I will take the fall for it!"

Sources familiar with the deal in question say it ultimately was put through properly and was not mischaracterized and then re-recorded.

Mohebbs, who testified before the committee July 30, is likely to face questions from the committee regarding several e-mails he sent to Qwest managers in 2001. In those e-mails, Mohebbs pressured Qwest managers such as sales chief Greg Casey to push to complete deals so Qwest could log as much revenue as possible from them in a given quarter. In at least one case, Casey answered back that former Qwest finance chief Robin Szeliga had instructed managers to stop cutting such deals.

A source said Mohebbs intends to tell the committee today that pushing sales executives to close deals is not illegal and in fact common in corporate America. Mohebbs also might note that while at least nine other top executives left Qwest after selling millions of dollars in Qwest stock, he stayed and has sold no Qwest stock.

Schaffer is expected to tell the committee that Qwest has changed its policies and has new procedures in place to prevent improper accounting. One of those is a change in corporate culture. The company now is telling employees to do only what they think is correct and to come forward if they believe something is being done improperly.

Schaffer is also expected to tell lawmakers that the company is still reviewing \$531 million worth of revenue related to capacity swaps, and will decide in the next few weeks whether to restate its books to erase any of that revenue. Qwest just announced it is stripping \$950 million from its books related to two-thirds of its capacity swaps.

The committee is likely to ask Nacchio about his level of involvement in the swap deals under investigation. Nacchio's spokesman declined Monday to discuss Nacchio's testimony planned for today. However, Qwest managers have said Nacchio sometimes got involved in negotiations if another company's CEO initiated it. For example, Nacchio knew former Enron CEO Jeff Skilling from previous work and negotiated with him on a controversial Qwest swap with Enron in September 2001.

In other Qwest news, the company on Monday refiled its applications with the Federal Communications Commission to begin selling long-distance service in nine

states: Colorado, Idaho, Iowa, North Dakota, Wyoming, Montana, Utah, Washington and Nebraska. Qwest pulled the applications last month after the FCC indicated it would reject them because of concerns over Qwest's accounting methods.

In the new filing, Qwest created a subsidiary, Qwest Long Distance Corp., to handle the applications. Qwest contends the subsidiary should satisfy the FCC's concerns because it does not carry Qwest's accounting history. "We've reviewed the details of this plan with the commission, and we feel confident that the plan is compliant," said Steve Davis, Qwest's senior vice president of policy and law.

Qwest has yet to file applications to sell long-distance in the five other states in which it provides local phone service: Oregon, Arizona, New Mexico, South Dakota and Minnesota. All told, analysts estimate Qwest can gain additional annual revenue of at least \$1 billion once it gets approval to sell long-distance service in all 14 of the states.

*Denver Post business writer Kris Hudson contributed to this report.*

**TOUCH AMERICA OPPOSITION  
QWEST 271 APPLICATION  
CO, ID, IA, MT, NE, ND  
UT, WA AND WY**

**Exhibit E**

**Excerpt from the October 1, 2002 Hearing  
The Subcommittee on Oversight and Investigations  
Of the House Committee on Energy and Commerce**

**Excerpt from the October 1, 2002 Hearing  
The Subcommittee on Oversight and Investigations  
Of the House Committee on Energy and Commerce\***

*“Capacity Swaps by Global Crossing and Qwest:  
Sham Transactions Designed to Boost Revenues?”*

\*Official Hearing Transcript is not currently available.

<b>GREENWOOD</b>	The gentlelady has expired and we'll do second round. As a matter of housekeeping the Chair has unanimous consent that the – all of the documents in the binder will be part of the record as well as the – those discussed today including the letter just introduced by Mr. Schaffer. Without objections, so it is. The chair recognizes himself for ten minutes and turns to Mr. Mohebbi and I would ask you to turn to Tab 62 in the binder which is a series of emails in part between you and a gentleman by the name of David Boast. They were sent on June 13, 2000. Do you have that document, sir?
<b>MOHEBBI</b>	Yes, Mr. Chairman
<b>GREENWOOD</b>	Let me read from it in part: Mr. Boast writes to you, we agreed at the time of the Touch America Cart allocation that we would not be able to do both this IRU and Touch America. This is not a challenge – it is impossible and we shouldn't spend any time at all on this or we could jeopardize our other activities. Let's get sales to find other IRU opportunities. And then you wrote back, 'what if we misroute the IRU and then route it as supposed to? And, Mr. Boast writes back to you, if we could do this which I'm not sure we can, then all we have to do is get audited, get caught and get screwed. To which you respond, I know it is risky – I will take the fall for it.' Could you elaborate on that series of emails?
<b>MOHEBBI</b>	Yes, I actually I would be delighted to get the opportunity to do that. And, if I could, I'd like to set the stage in terms of what the discussion is – the series of emails Mr. Chairman that are here start with an email from – that has to do with engineering – there is a person in the wholesale organization that is concerned about a potential sale to a customer that may not be completed because there is a lack of equipment. It was escalated to me by the person who ran the wholesale organization and I obviously sent it to Mr. Boast, who at that time was responsible for operations and engineering and I – one of things that I do in my job is obviously try to encourage people to do as good as they can and make sure that they get the work done. Mr. Boast in this particular case at the moment thought that it was impossible to get these two particular jobs done at the same time. And my suggestion was what if we misroute the IRU and then route it as it's supposed to. Misroute in the long-haul engineering parlance is when you cannot connect from point A to point B – let's say if you have an IRU engineer-ing wise – if you can't connect at the shortest distance – for a number of reasons – you don't have enough circuits, your network is incomplete and you have to

	go maybe on a route that's not the shortest distance. The customer doesn't pay for it but you have to go through a longer route to get there – that's really what the definition of the misroute is and is it possible for us to do that and....
<b>GREENWOOD</b>	Let me understand you. You said a misroute comes when you cannot connect point A to point B
<b>MOHEBBI</b>	That is correct...
<b>GREENWOOD</b>	Let me finish... which then requires you because of your inability to connect A and B to go route. Now it seems to be another thing entirely if you say, "what if we misroute it" because there you're not being forced to; you're choosing to.
<b>MOHEBBI</b>	Yes
<b>GREENWOOD</b>	Correct? Okay.
<b>MOHEBBI</b>	So, as I was saying that the shortest connection between two points is the route. If you connect point A and point B, but don't connect it through the shortest route, that becomes a misroute in the engineering parlance. And eventually – you can do a lot of misroutes and most of the people that have "new networks" have what's called a misroute and then later on you have to work with the customers, obviously, because to change the misroute and leave out them – you have to bring the circuit down. And if the purchaser is a carrier, for example, they'll be out of service for a day, for two days, etc. So, in that particular case my suggestion was is it possible – you don't have – I understand you don't have the circuits to build that particular route, but we could go elsewhere and then come back – Mr. Boast is obviously then talking about accounting and why this could be a potential with accounting and then uses the words that that you mention. I believe that Mr. Boast mentioned this because he was worrying about what happens if revenue is recognized on this particular route and then later on, if you want to change that particular route – there could be concerns about...
<b>GREENWOOD</b>	And when he said did you ... when he communicated that to you, did you understand that that's what he was communicating to you – an audit concern?
<b>MOHEBBI</b>	Again, at the time, I'm going with I'm seeing right now – and I saw this email obviously, a few days ago, but my reading right now, Mr. Chairman, that he was concerned about the audit potential because of the revenue recognition...
<b>GREENWOOD</b>	I understand that. My question is do you assume that's what you believed his concern to be then?
<b>MOHEBBI</b>	I believe that concern.....
<b>GREENWOOD</b>	So then – and he talked about his concern that he'd get audited get caught

<b>MOHEBBI</b>	Yes...
<b>GREENWOOD</b>	and I assume, get screwed means, get in trouble with the law?
<b>MOHEBBI</b>	Yes. Or, with internal auditors.
<b>GREENWOOD</b>	Okay. Okay, so, so when you saw him respond this way and you responded by saying, "I know it is risky, I will take the fall for it" – what did you...
<b>MOHEBBI</b>	Yes.
<b>GREENWOOD</b>	That was not an engineering fall, was it?
<b>MOHEBBI</b>	No. Specifically again, I'm glad that you, that I have an opportunity to talk to you about that because the words usually go with the people and you have to know the nature of the people. In this particular case I was dealing with engineers and operations people and this was maybe the shortest way, uh, the choice of words could be then discussed, but this was the shortest way for me to say, "Look, you deal with the operational issues that you; try your best to try to get the two jobs done at the same time; if there are, that the concerns, the risks have to do with revenue recognition." If there are any concerns, we do the work and let's say the accountants come back and say that this is a revenue, can't be recognized; I'm going to take the blame for, for that. And that was what I was trying to communicate to Mr. Boast at this time. To try to get the job done; do your best to get the job done. And, and again as if I could, if I could just provide the follow-up, Mr. Chairman, uh, since I have the opportunity I thank the staff for providing us with, with the information ahead of time. Uh, I checked on this particular scenario and indeed Mr. Boast was incorrect, the impossible did get done possibly, and the two jobs left on, on the route, and uh, the revenue was recognized in the quarter, and by the way, the revenue wasn't required in terms of whether objectives work for the quarters, but it was a risk that I was taking believing that if the operating people did the work, uh, you know, that's, that's what I was asking them to do.
<b>GREENWOOD</b>	But it wasn't a legal risk you were taking. You weren't saying, go ahead and break the law, and if you get caught...
<b>MOHEBBI</b>	No, no...
<b>GREENWOOD</b>	I'll, I'll take the (inaudible)
<b>MOHEBBI</b>	No, Mr. Chairman, that was....
<b>GREENWOOD</b>	That's not what you were saying...
<b>MOHEBBI</b>	That was definitely not what I meant.

<b>GREENWOOD</b>	Very well. Uh, the email to Nick Jeffrey at C&W that came from your email account has been the subject of a lot of controversy....
<b>MOHEBBI</b>	That's right.
<b>GREENWOOD</b>	I think it can be found at Tab 64, if you don't have it in front of you right now?
<b>MOHEBBI</b>	I do, Mr. Chairman.
<b>GREENWOOD</b>	Okay. Do you recall sending that email?
<b>MOHEBBI</b>	I do not recall sending this email, Mr. Chairman.
<b>GREENWOOD</b>	Did you give anyone else permission to send this email from your account?
<b>MOHEBBI</b>	I do not recall giving someone permission from my account to send this email.
<b>GREENWOOD</b>	Can you imagine how an email would be sent from your account without you sending it or giving someone else permission to send it from your account?
<b>MOHEBBI</b>	Again, I do not, and, and one of the key things that I wanted to do was, uh, though, was I wanted to make sure, because it is an important part of the discussions that we've had here. I think it's important that as we find out what the technicality is and, and how an email can sent, it is important to note that we do know that it went from my computer, that it went from a computer that has my name on it, so I better, and I will, take full responsibility for the email. Uh,....
<b>GREENWOOD</b>	Although you say you don't recall, uh, sending the email, uh, you don't rule out the possibility that in fact that you typed all these words into your computer and sent it?
<b>MOHEBBI</b>	Uh, no, I believe that, I, I haven't, I think we have enough data that we've provided that shows these particular words were actually negotiated extensively by the contract team, as I mentioned in my opening testimony, the contract teams in Qwest that work on contracts and, uh, addendums, etc., which particular words I think were presented, negotiated. Again, I did not know that at obviously at the time this is all that we have found out so far, Mr. Chairman, these words were negotiated, a lot of back and forth, and that weren't being meant, and then they were okayed by the experts. Uh, while I did not recall sending it, if I'm looking at it right now, I mean if it is presented to me in the process, the way that we have a process to work. If somebody asks me, it was in the process to send an email, mainly because the customer needs the comfort level of some sort, I would have sent it.
<b>GREENWOOD</b>	You are familiar with this particular C&W deal, correct?

<b>MOHEBBI</b>	Uh, I have read about, and so I'm a bit familiar with it, Mr. Chairman.
<b>GREENWOOD</b>	Mr. Jeffrey of C&W swore in an affidavit provided to the Committee last week that he spoke with you about this deal and about the contents of the email prior to, you know, being sent. Do you recall this conversation?
<b>MOHEBBI</b>	I do not recall this conversation.
<b>GREENWOOD</b>	Uh....
<b>MOHEBBI</b>	My, my recollection is that the first time I talked live in person with, I have not yet met Mr. Jeffrey personally, but the first time I actually talked to him on the phone was sometime in 2002, when there other issues with cable and wireless and they specifically asked me to be on a particular phone call.
<b>GREENWOOD</b>	Well, regardless of who sent the email and whether you recall this conversation, do you, the statements in this email are problematic to Qwest, uh, in recognizing revenue up front, are they not?
<b>MOHEBBI</b>	Uh, I have not seen the statement, Mr. Chairman, of Mr. Jeffrey.
<b>GREENWOOD</b>	No, the email itself?
<b>MOHEBBI</b>	I do not believe so.
<b>GREENWOOD</b>	Why not?
<b>MOHEBBI</b>	Again, uh, for the number of reasons that I mentioned, the, uh, the text of this particular email was reviewed and okayed by our experts, and, uh, the company as well as the experts, you can add my name on it that I'm not the experts, believe that this particular email does not change the stock transfer of the transaction, and that, that the transaction at hand, it was mainly provided as a comfort level and to provide some pricing and, uh, that's, that's the position that the company has taken almost all along....
<b>GREENWOOD</b>	Does Ms. Szeliga agree with that statement?
<b>MOHEBBI</b>	Uh, uh, I don't know why Ms. Szeliga would disagree with that particular statement.
<b>GREENWOOD</b>	She didn't find a problem with this, this email and with this practice?
<b>MOHEBBI</b>	I, I think again, I'm providing you with my opinion, Mr. Chairman. I think Ms. Szeliga would have had issues with the process, which is, when you have a particular email like this one, that's, that's sent, obviously there is a contract file, and there's a filing process and maybe she's got a problem with a particular process, but

	it's been, the experts' definition and the experts' opinion that have seen this particular email, that, uh, this does not change the substance of the transaction at hand.
<b>GREENWOOD</b>	Robin Szeliga told us last week that she was very angry because, uh, you knew not to do this, and more importantly, that you were the president of the company. She said, she said that she was angry, that this bothered her.
<b>MOHEBBI</b>	Okay, who did she share anger, because Mr. Chairman, I know that....
<b>GREENWOOD</b>	She said with you. She said that she shared that with you.
<b>MOHEBBI</b>	Ms. Szeliga to the best of my recollection, uh, after this particular email, was identified, uh, was, had actually stopped by my office, and I believe at the time counsel was with her as well. Uh, and she indicated about the existence of the email. Uh, the tone of the discussion was when, generally the tone of the discussion made very regular....
<b>GREENWOOD</b>	Why, why do you suppose she didn't know about this, this email, for ten months after it was issued?
<b>MOHEBBI</b>	And that, Mr. Chairman, what I was saying is that if there was an issue, maybe the issue was that there is an email. The content of the email, the experts have looked at it, negotiated the words, and, uh, it does not change the....
<b>GREENWOOD</b>	Why wouldn't, why wouldn't this language, if this was important to send, if this is important information, why wouldn't this be part of the upfront contract? Why did this have to travel, uh, in email form, unbeknownst to others in the company for as much as ten months?
<b>MOHEBBI</b>	That's....
<b>GREENWOOD</b>	It certainly strikes us as kind of a secret side deal that might have been necessary in order to, uh, allow for the accounting to be done the way that it was without, uh, this kind of an agreement being, uh, uh, visible to the world.
<b>MOHEBBI</b>	Mr. Chairman, certainly there was no intent to hide this particular agreement. Uh, my understanding is in particular is that there is process, that, uh, these documents, do through and, uh, this document went through that process to (inaudible) to have found them. I think if there is an issue it goes back to once that document was sent, what happened to the filing of the document? But you have asked a specific question which I agree, and I would like to respond to, and that is why is there even a need for addendums to contracts? And, again....
<b>GREENWOOD</b>	Well, addendums to contracts are just that—they're appended to the contract...
<b>MOHEBBI</b>	That's correct.

<b>GREENWOOD</b>	They become part of the original document, in addition to the document, they become visible to anyone who examined the document.
<b>MOHEBBI</b>	And Mr. Chairman, sometime....
<b>GREENWOOD</b>	That didn't (inaudible)
<b>MOHEBBI</b>	Uh, Mr. Chairman, in this particular case I believe as I found out that the customer required some comfort regarding particular pricing, and this particular....
<b>GREENWOOD</b>	Then why didn't, why, why was that not then included for, uh, uh, amended to the contract?
<b>MOHEBBI</b>	It's a good question. I do not have the answer to that question because I don't do the specific contracting and I don't want to come up with a reason that, that's not correct. What I can tell is that the one point that I could say that is, that you could look at and if you say, go into this whole process, is once a particular document, no matter whether it is a comfort letter, etc. If that's, if my name's on it, and that's obviously significant if it's gone from Qwest, I believe maybe the filing of a particular document like this one is, is important, and, I think, I cannot attest to you that when this particular document was sent from my computer, uh, that the way that it was filed, uh, uh, was something that I followed up on, and then you got something that I, I had to found out about and, and the filing for something to go after. But I don't think, I want to make sure from, from where I sit, and from what I know, I don't think there was an attempt made, Mr. Chairman, to try to write a quick email and then have it not be anywhere.
<b>GREENWOOD</b>	You understand that you're testifying under oath because you're saying, this came from my computer, but I didn't do it. You're saying that uh, yes, it was not, uh, included in the contract, but I don't know why. You're saying that it took 10 months for the finance people to know about this, but I don't really understand why that is. Uh, and so you can't explain any of this. It's a great mystery to you, and yet, uh, there is a plausible explanation that those of us trying to under..., interpret all of this have, and would be that this would be a very convenient way to manage the revenues the way you wanted to, uh, and, uh, and be able to have it both ways. In other words be able to have the accountants treat the revenues one way, uh, and, and yet this not show up on the legal documents because in fact, it, it may very well have been that if it was incorporated in the legal documents, it wouldn't have been, you wouldn't have been able to account for the revenues that way. So on the one hand, you have a very plausible, a very logical reason why this would be done in a surreptitious fashion. On the other hand, we have your explanation, which says I don't understand how it came out of my computer; I don't understand why it wasn't part of the document; I don't understand why the financial people didn't know about it for 10 months.
<b>MOHEBBI</b>	If I could reply to that, Mr. Chairman?

<b>GREENWOOD</b>	Please.
<b>MOHEBBI</b>	<p>I think one of the things that I wanted to make sure to be helpful to this Committee, was that there was a lot of discussion, and I believe it was the ranking member that said it was interesting that nobody's taking responsibility for this email being sent. And one of the things that I said was obviously I want to make sure you knew what the circumstances around the email. I take full responsibility for the email. It's got my name on it. I don't recall sending it, but that's an issue separate from, it is, I take accountability for this email. I believe also that what I tried to tell you is that the experts at the company that had reviewed this particular, we've done as a company, a lot of work in this area, the experts have reviewed the text of this particular email; experts included contract management, people from the financial organization, legal—they had reviewed this particular document, and before and after it was sent, those particular experts' position has been that this particular email did not change the content and the, it did not change the substance of that transaction. That's, that's the, that's what I'm trying to tell you. Is that we strongly believed that this particular email did not change the substance of transaction. And I don't want the subcommittee to be hung about was the email sent, was the email not sent; we have verified the email was sent; so let's just take it at that, and say, I'll take, it's got my name on it, the buck stops with me.</p>
<b>GREENWOOD</b>	<p>Would you describe the oral agreement that with Flag in the same way? That it wasn't, the oral agreement with Flag, would you describe that in the same way, it was just a matter of comfort; it didn't change the, uh, the nature of the contract? Did you watch the hearings last week? Read a transcript of them?</p>
<b>MOHEBBI</b>	<p>Some, Mr. Chairman, not the whole, not the whole transcript, I apologize. I was not personally involved in a flag transaction. Uh, in terms of what a particular flag transaction was, if you would like me to....</p>
<b>GREENWOOD</b>	<p>Uh, my time has expired. I'm going to recognize the gentle lady from Colorado for a second.</p>

**TOUCH AMERICA OPPOSITION  
QWEST 271 APPLICATION  
CO, ID, IA, MT, NE, ND  
UT, WA AND WY**

**CERTIFICATE OF SERVICE**

I, Julie Corsig, do hereby certify that on this 15<sup>th</sup> day of October, 2002, a copy of the foregoing Opposition filed on behalf of Touch America, Inc. in WC Docket No. 02-314, was served by U.S. Mail, postage prepaid, to the parties on the attached service list.

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

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